

IN THE CIRCUIT COURT OF NICHOLAS COUNTY, WEST VIRGINIA

ANN MORGAN ZIMMERER
and GERALD LEE ZIMMERER,

2007 FEB 22 PM 4:10

Plaintiffs,

vs.

Civil Action No. 04-P-50

MARK E. ROMANO and ROBIN J. ROMANO,
and WEST VIRGINIA DEPARTMENT OF
TRANSPORTATION, DIVISION OF HIGHWAYS,

Defendants.

**ORDER GRANTING DEFENDANTS' MARK E. ROMANO AND
ROBIN J. ROMANOS MOTION FOR SUMMARY JUDGMENT; DENYING
PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT AGAINST MARK E.
ROMANO AND ROBIN J. ROMANO AND WEST VIRGINIA DEPARTMENT OF
TRANSPORTATION, DIVISION OF HIGHWAYS; DENYING MOTION FO
PLAINTIFFS' TO ASSESS COSTS AGAINST THE WEST VIRGINIA DEPARTMENT
OF TRANSPORTATION, DIVISION OF HIGHWAYS**

2007 FEB 22 PM 4:27

On the 12th day of February, 2007, appeared the plaintiffs, Ann Morgan Zimmerer and Gerald Lee Zimmerer, pro se, and also appeared the defendant, Mark E. Romano, personally, and Robin J. Romano, by counsel, Gregory A. Tucker, and also appeared the West Virginia Department of Transportation, Division of Highways, telephonically by its counsel, G. Alan Williams, for the purpose of a hearing on the pending Plaintiffs' Motion for Summary Judgment against the defendant Romanos, Plaintiffs' Motion for Summary Judgment against the West Virginia Department of Transportation, Division of Highways. Plaintiffs' motion for assessment of costs against the West Virginia Department of Transportation, Division of Highways, and Defendants Romanos' Motion for Summary Judgment against the Plaintiffs.

Thereupon, the Court advised the parties that it had reviewed the motions pending before the Court and thereafter entertained argument by the parties at the conclusion of which the Court did make the following Findings of Fact:

1. The Hill heirs were the original owners of a parcel of 82.65 acres, more or less, situate on Muddlety Creek and Puddy Run, Hamilton District, Nicholas County, West Virginia.

2. Pursuant to that certain civil action styled the *West Virginia Department of Highways, a corporation, and William S. Ritchie, Jr., West Virginia Commissioner of Highways, petitioners, vs. William Guy Hill, et al., Case No. 2127*, which Final Order was entered by the Circuit Court of Nicholas County, West Virginia on June 22, 1971, the West Virginia Department of Highways was vested with title to controlled and non-controlled access rights of way totaling 20.29 acres for the purpose of constructing and improving United State Route 19.

3. By deed dated April 6, 1995 and recorded in the Office of the Clerk of the County Commission of Nicholas County, West Virginia in Deed Book 362 at page 809, James W. Hill, et al., conveyed to Greenwood Timber, Inc., a West Virginia corporation, the subject parcel of 82.65 acres, more or less. Further, said deed stated that "there is reserved from the above description that previous outconveyance to the West Virginia Department of Highways of 20.29 acres, leaving a residue of 62.36 acres, more or less.

4. By deed dated November 19, 1998, and recorded in the aforesaid clerk's office in Deed Book 388 at page 748, Greenwood Timber, Inc. conveyed to Mark E. Romano and Robin J. Romano, his wife, the subject 82.65 acres utilizing the same description as contained in the deed to Greenwood Timber, Inc.. Further, said deed to Romanos made the conveyance subject to all

previous outconveyances of record, including the 20.29 acres previously conveyed (vested) to the West Virginia Department of Highways.

5. By various conveyances, all of which are of record in the aforesaid clerk's office, the Hill heirs conveyed to the plaintiff, Ann Morgan Zimmerer, by quit claim deeds all of the interest they may have reserved in their hereinabove referenced deed to Greenwood Timber.

6. The plaintiffs claim ownership of the 1.18 acre parcel which is the subject of this civil action subject to the right of way vested in the defendant, West Virginia Department of Transportation, Division of Highways.

7. A portion of the 20.29 acre right of way previously vested in the West Virginia Department of Transportation, Division of Highways, was declared by the Commissioner of the Department of Transportation, Division of Highways, to be surplus property and no longer necessary for state road purposes. By quitclaim deed dated January 10, 2002 and recorded in the aforesaid clerk's office in Deed Book 406 at page 691, and thereafter by Corrective Deed dated January 20, 2004 and recorded in the aforesaid clerk's office in Deed Book 421 at page 603, the West Virginia Department of Transportation, Division of Highways, conveyed all of its right, title and interest in and to the 1.18 acre parcel to Mark E. Romano and Robin J. Romano.

8. The Defendants Mark E. Romano and Robin J. Romano are abutting landowners to the 1.18 acre parcel which is the subject of this civil action by virtue of their ownership of the residue of the original 82.65 acre parcel conveyed to Greenwood Timber, Inc. from the Hill heirs by the hereinabove referenced deed.

9. The Plaintiff Ann Morgan Zimmerer is also an abutting landowner to the 1.18 acre parcel as she is the owner of an adjoining Cox parcel which abuts the subject 1.18 acre parcel on the western portion of said 1.18 acre parcel.

10. The Romano parcel being the residue of the original 82.65 acre parcel abuts approximately 95% upon said 1.18 acre parcel and the plaintiff Ann Morgan Zimmerer's Cox parcel abuts approximately 5% upon said 1.18 acre parcel.

11. Based upon an aerial photograph of the subject 1.18 acre parcel and the parcels adjoining same prepared by the Nicholas County Assessor at the request of the Court, if the 1.18 acre parcel was vested in the Plaintiffs, present ingress and egress to the Romano 82.65 acre parcel would be denied.

Based upon the foregoing Findings of Fact, the Court does hereby make the following Conclusions of Law:

1. Neither the Plaintiffs nor the Defendants Mark E. Romano and Robin J. Romano are principal abutting landowners as defined by §17-A-2A-19(c)(3)(A)(I) of the *West Virginia Code* which defines principal abutting landowner as an individual from whom the real estate was acquired or his or her surviving spouse or decedent.

2. The Plaintiff Ann Morgan Zimmerer and the Defendants Mark E. Romano and Robin J. Romano meet the definition of abutting landowners as provided for by the *Code* as each own land which abuts or touches the subject 1.18 acre parcel.

3. The Commissioner of the West Virginia Department of Transportation, Division of Highways, has discretion to transfer surplus property by giving abutting landowners first refusal to purchase same according to their needs.

4. The Commissioner of the West Virginia Department of Transportation, Division of Highways, conveyed to the Plaintiff Ann Morgan Zimmerer .91 acres of excess right of way which was not part of the original 82.65 acre parcel and 1.18 acres of the original 82.65 acres to Mark E. Romano and Robin J. Romano. Giving said 1.18 acre parcel to anyone other than the Defendants Romano would block Romanos' access to U.S. Route 19.

5. The Commissioner of the West Virginia Department of Transportation, Division of Highways, did not abuse his discretion in conveying the 1.18 acre excess right of way to Mark E. Romano and Robin J. Romano.

6. The deed from the Hill heirs to Greenwood Timber, Inc. dated April 6, 1995 and recorded in the aforesaid clerk's office in Deed Book 362 at page 809 described the entire 82.65 parcel reserving only therefrom the 20.29 acres right of way previously vested in the West Virginia Department of Highways. The deed by its own language conveyed to Greenwood Timber, Inc. the entire 82.65 acre parcel reserving only the 20.29 acres and right of way previously vested in the West Virginia Department of Highways by virtue of the Order of the Circuit Court of Nicholas County, West Virginia.

7. The deed from Greenwood Timber, Inc. to Mark E. Romano and Robin J. Romano dated November 19, 1998 and recorded in the aforesaid clerk's office in Deed Book 388 at page 748 conveyed to the Romanos 82.65 acres less the 20.29 acre right of way previously vested in the West Virginia Department of Highways. Said deed further reserved additional properties which were not the subject of this civil action.

8. The Hill heirs by quitclaim deeds of record in the aforesaid clerk's office conveyed nothing to the Plaintiff Ann Morgan Zimmerer as the Hill heirs owned no interest in the original

82.65 acre parcel or the 20.29 acre right of way as their deed to Greenwood Timber, Inc. reserved nothing to them.

9. The Defendants Mark E. Romano and Robin J. Romano are vested with fee simple title to the entire interest in the 1.18 acre parcel by virtue of the deed to them from Greenwood Timber, Inc. dated November 19, 1998 and recorded in the aforesaid clerk's office in Deed Book 388 at page 748 and further by virtue of the quitclaim deeds from the West Virginia Department of Transportation, Division of Highways, hereinabove referenced. The Plaintiffs own no interest in any portion of the rights of way vested in the West Virginia Department Highways by virtue of that certain condemnation action styled *West Virginia Department of Highways, et als. vs. William Guy Hill, et al.*, Nicholas County Civil Action No. 2127.

Based upon the foregoing Findings of Fact and Conclusion of Law, it is the ORDER and JUDGMENT of the Court as follows:

1. That the Plaintiff's amended complaint for ejectment and to quiet title is denied.
2. That the Plaintiffs' Motion for Summary Judgment against the West Virginia Department of Transportation, Division of Highways, is denied as the commissioner acted within his discretion.
3. That the Plaintiffs' Motion for Summary Judgment against the Defendants Mark E. Romano and Robin J. Romano is denied as the Defendants are vested with fee simple title to the 1.18 acre parcel free and clear of any claim of ownership by Ann Morgan Zimmerer and Gerald Lee Zimmerer.
4. That the Motion for Summary Judgment of Mark E. Romano and Robin J. Romano against the Plaintiffs is granted as the Romanos own fee simple title to the 1.18 acre parcel free and clear of any claim of the plaintiffs Ann Morgan Zimmerer and Gerald Lee Zimmerer.

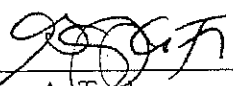
5. The clerk of this Court is directed to provide a certified copy of this Order to each counsel of record. Further the clerk of this Court is directed to provide a certified copy of this Order to the Clerk of the County Commission of Nicholas County, West Virginia, for recordation in the deed records of Nicholas County, West Virginia. Indexing shall be under the names of the plaintiffs, Ann Morgan Zimmerer and Gerald Lee Zimmer, and defendants, Mark E. Romano and Robin J. Romano.

All until further Order of the Court.

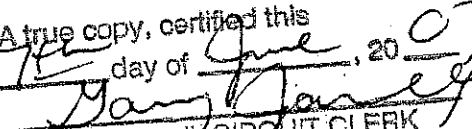
ENTER: 6-4-07


JUDGE

Prepared by:



Gregory A. Tucker
Gregory A. Tucker, P.L.L.C.
719 Main Street
Summersville, WV 26651
(304) 872-2500
State Bar I.D. No. 3810

A true copy, certified this
15 day of June, 2007


Gary Jarrell, CIRCUIT CLERK
Nicholas County Circuit Court
Summersville, WV 26651
By , Deputy